IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**DISMISS SPECIFICATION 1**
	)	**OF CHARGE II FOR FAILURE**
	)	**TO STATE AN OFFENSE**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 29 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 907(b)(1)(B), requests this Court to dismiss Specification 1 of Charge II for failure to state a cognizable offense under Article 134 because Specification 1 of Charge II, as currently drafted, is preempted by Article 104 or, in the alternative, because Specification 1 of Charge II must be charged as a violation of Article 92 since there is a lawful order or regulation prohibiting the unauthorized possession and dissemination of classified information.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 904, 934 (2010). The case has been referred to a general court martial by the convening authority with a special instruction that the case is not a capital referral.

4. In Specification 1 of Charge II, the Government pleads that PFC Manning "wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy . . . ." Additionally, in the Specification of Charge I, the Government pleads that PFC Manning "between on or about 1 November 2009 and on or about 27 May 2010, without proper authority knowingly gave intelligence to the enemy, through indirect means." On 14 February 2012, the Defense, pursuant to R.C.M. 906(b)(6), moved this Court to direct the Government to respond to a bill of particulars in the subject case on the grounds that it was necessary for PFC Manning to understand the charges against him so that he could adequately prepare his defense and not be subject to unfair surprise at trial. The Government's particulars in response to the Specification of Charge I indicated that its theory of knowingly giving intelligence to the enemy was "by transmitting certain intelligence, specified in a separate classified document, to the enemy through the WikiLeaks website." *See* Government Bill of Particulars Response. The Government also stated that its theory of indirect means was that PFC Manning gave the charged intelligence to "the WikiLeaks website." *Id.* Additionally, the Government's particulars in response to Specification 1 of Charge II was that PFC Manning wrongfully and wantonly cause intelligence to be published on the Internet "by leaking thousands of documents gathered from the SIPRNET, including several databases, to the WikiLeaks organization." *Id*. The Defense maintains that Specification 1 of Charge II should be dismissed because it is preempted by Article 104. In the alternative, the Defense argues that Specification 1 of Charge II should be dismissed because it must be charged as a violation of Article 92 – and not as a violation of Article 134 – since there is a lawful general order or regulation covering PFC Manning's alleged conduct that forms the factual basis for Specification 1 of Charge II, namely, the unauthorized possession and dissemination of classified information.

WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the following evidence in support of the Defense's motion.

a. Charge Sheet;

b. Continuation of DD Form 457.

LEGAL AUTHORITY AND ARGUMENT

A. Specification 1 of Charge II Should be Dismissed Because it is Preempted by Article 104

6. The Defense submits that Specification 1 of Charge II fails to state a cognizable offense because it is preempted by Article 104. Accordingly, the specification should be dismissed.

7. Article 104 punishes "[a]ny person who – (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly[.]" 10 U.S.C. § 904. Article 134, by contrast, applies to offenses "not specifically mentioned in [the UCMJ.]" *Id.* § 934.

8. The Court of Military Appeals has defined the doctrine of preemption as "the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, simply by deleting a vital element." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). The preemption doctrine is described in paragraph 60(c)(5)(a) of the Manual for Courts-Martial (MCM), which provides, in pertinent part:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking – for example, intent – there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

MCM, para. 60(c)(5)(a). Courts apply a two-pronged test to determine whether an Article 134 charge is preempted by another Article in any given case. First, it must be shown that Congress "indicate[d] through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010); *see Kick*, 7 M.J. at 85; *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978). Second, it must be established that the offense charged under Article 134 is composed of a "residuum of elements" of an enumerated offense under the UCMJ. *Wright*, 5 M.J. at 111; *see Kick*, 7 M.J. at 85. Both prongs are satisfied by the Government's use of Article 134 in the instant case.

9. Congress clearly intended Article 104 to occupy the field of aiding or communicating with the enemy. Article 104 uses very broad language to accomplish this intent; the Article punishes anyone who aids, attempts to aid, knowingly harbors, protects, gives intelligence to, communicates with, corresponds with, *or* holds any intercourse with the

enemy. 10 U.S.C. § 904. Not only does Article 104 prohibit each and every one of these acts, a person can violate this Article "either directly or indirectly[.]" *Id.* Through this "direct legislative language," *Anderson*, 68 M.J. at 387, Congress has clearly demonstrated its intent for Article 104 "to cover a class of offenses in a complete way." *Kick*, 7 M.J. at 85. Therefore, the first prong of the preemption inquiry is satisfied by the all encompassing language of Article 104.

10. Additionally, the Article 134 specification that the Government has attempted to charge in this case is simply a residuum of most of the elements required for an Article 104 prosecution. For the reasons fully articulated in the Defense's Article 104 Motion to Dismiss, the Government's Article 104 charge – that PFC Manning indirectly gave intelligence information to the enemy by publishing it on the internet with the knowledge that it could be accessed by the enemy – fails to state a cognizable offense under Article 104 because it does not allege the requisite intent to aid the enemy. *See* Defense Motion to Dismiss the Specification of Charge I for Failure to State an Offense. The Government has simply used Article 134 in an effort to rectify its inability to allege the requisite criminal intent under Article 104. However, the Government is not permitted to utilize Article 134 to circumvent the intent requirement of Article 104 in this manner. As mentioned above, the Government has alleged that PFC Manning violated Article 134 by "wrongfully and wantonly causing to be published on the internet intelligence belonging to the United States, thereby providing such intelligence to persons not entitled to receive it, having knowledge that intelligence published on the internet is accessible to the enemy." However, this specification essentially alleges an Article 104 violation – indirectly giving intelligence to the enemy – without alleging any corresponding *mens rea*.

11. This is precisely the evil that the preemption doctrine was designed to combat. The first case enunciating the preemption doctrine in the UCMJ context, *United States v. Norris*, perfectly illustrates this point. In that case, the accused was charged with larceny and wrongful appropriation under Article 121 and wrongful taking under Article 134. *United States v. Norris*, 8 C.M.R. 36, 37-38 (C.M.A. 1953). The accused was initially found guilty of wrongful appropriation and wrongful taking, but on appeal the board of review held that the law officer had erred in not instructing on the effect of intoxication on specific intent. *Id.* at 38. The board remedied this defect by vacating the wrongful appropriation conviction and affirming the wrongful taking conviction under Article 134, as the offenses charged under Article 121 required a specific intent to deprive the owner of the property, either permanently or temporarily, and the wrongful taking charge required only a general criminal intent. *Id.* The Court of Military Appeals reversed, holding that "there is no offense known as 'wrongful taking' requiring no element of specific intent, embraced by Article 134 of the Code." *Id.* at 40. The Court reasoned that:

> Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive articles . . . . We cannot

> grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.

Id. at 39. Just as the Government was not permitted in *Norris* to use Article 134 to create an Article 121-type offense when it was unable to prove the requisite intent under Article 121, so too should the Government not be permitted here to use Article 134 to create an Article 104-type offense when it is unable to prove the requisite intent under Article 104. *See id.* at 39-40; *see also* MCM, para. 60(c)(5)(a). As Specification 1 of Charge II is currently drafted, this is precisely what the phrase "having knowledge that intelligence published on the internet is accessible to the enemy" seeks to accomplish. Thus, this specification should be dismissed, as it is preempted by Article 104.

12. The result in *Anderson* does not foreclose the preemption question in this case. The accused in *Anderson* provided emails including "comprehensive information about the number of soldiers in his unit, their training programs, and the precise location to which his unit would be deploying" to a person he believed to be a "Muslim extremist," who in reality was a concerned American citizen attempting to thwart terrorist activities. 68 M.J. at 381. The accused also met with undercover FBI agents whom he believed to be Al Qaeda operatives and disclosed to them "computer diskettes containing classified information on the vulnerabilities of various military vehicles, the vulnerabilities of his unit as they travelled to Iraq, and other sensitive information." *Id.* As a result of his conduct, the accused was charged with, and convicted of, attempting to give intelligence information to the enemy, attempting to communicate with the enemy, and attempting to aid the enemy, all in violation of Articles 80 and 104, and of "wrongfully and dishonorably providing information to military personnel whom he believed were terrorists, which was conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces," in violation of Article 134. *Id.* at 380.

13. On appeal, the accused contended, *inter alia*, that Article 104 preempted the Article 134 offense in his case. *Id.* at 386. The Court of Appeals for the Armed Forces rejected the accused's preemption argument. *Id.* at 387. The Court first reasoned that "the legislative history of Article 104, UCMJ, does not clearly indicate that Congress intended for offenses similar to those at issue to only be punishable under Article 104, UCMJ, to the exclusion of Article 134, UCMJ." *Id.* The Court then observed that "while the two charges in this case have parallel facts, as charged they are nonetheless directed at distinct conduct." *Id.* The Court elaborated:

> The Article 104, UCMJ, charge was directed at [accused's] attempt to aid the enemy directly. The Article 134, UCMJ, charge was directed towards the distribution of sensitive material to individuals not authorized to receive it-in this case Criminal Investigation Command agents posing as the enemy, but the reasoning could just as easily be applied to the

> distribution of information to individuals who are not necessarily the enemy, such as a newspaper reporter, or for that matter the private citizen who first encountered [accused] on the "Brave Muslim" website. Unlike Article 104, UCMJ, the general offense as charged prohibits the dissemination of the information regardless of the intent behind that dissemination. If this distinction was not permissible in light of Article 104, UCMJ, Congress was free to clearly state that Article 104, UCMJ, supersedes Article 134, UCMJ, in this context.

Id.

14. Here, unlike in *Anderson*, the Article 104 Specification of Charge I and the Article 134 Specification (Specification 1) of Charge II are not aimed at distinct conduct, but rather are aimed at the exact same conduct – PFC Manning's alleged publication of United States intelligence information on the internet. Moreover, the Article 134 Specification in the instant case is not simply directed "towards the distribution of sensitive material to individuals not authorized to receive it[,]" as was the Article 134 Specification in *Anderson*. *Id.* Instead, the Government in this case has broadened the reach of Article 134 by including the phrase "having knowledge that intelligence published on the internet is accessible to the enemy" in the Article 134 Specification. By grafting this phrase into the Article 134 Specification, the Government has vitiated the distinction that the *Anderson* Court deemed crucial to its finding of no preemption: that the Article 104 charge was directed toward the accused's attempt to aid the enemy directly and the Article 134 charge was solely directed towards the dissemination of the information, regardless of the purpose/knowledge behind that dissemination. *See id.* By contrast, the Government here has directed the Article 134 charge and Article 104 charge at identical conduct and extended the reach of Article 134 beyond where it must remain contained: solely at the dissemination of the information to one not authorized to receive it. *Id.*

15. Additionally, the *Anderson* Court's statement that "the legislative history of Article 104, UCMJ, does not clearly indicate that Congress intended for *offenses similar to those at issue* to only be punishable under Article 104, UCMJ, to the exclusion of Article 134, UCMJ[,]" must be read in context. *Id.* (emphasis supplied). In *Anderson*, the Article 134 charge was directed solely at the accused's dissemination of information to those not authorized to receive it; it was immaterial to that charge whether he knew that the enemy could access or utilize the information he provided. *Id.* Thus, it is hardly surprising that the *Anderson* Court was unable to find any legislative history to clearly indicate that Congress intended to preempt Article 134 prosecutions for unauthorized dissemination of classified information. In the instant case, however, PFC Manning's alleged knowledge of the fact that the information could be accessed by the enemy appears to be central to the Article 134 Specification. The all-encompassing language of Article 104 clearly evidences Congress's intent to limit the prosecution of all efforts to aid or communicate

with the enemy to Article 104, and to preclude any Article 134 prosecutions of such conduct.

16. For these reasons, Specification 1 of Charge II, as currently charged, is preempted by Article 104. Accordingly, that specification should be dismissed.

B. Specification 1 of Charge II Should be Dismissed Because the Facts Alleged Must be Charged as a Violation of Article 92 and not as a Violation of Article 134

17. In the alternative, the Defense submits that the Government fails to state an Article 134 offense against PFC Manning because it cannot lawfully charge an accused with an Article 134 offense when the charged conduct violates a punitive lawful general order or regulation. In such a situation, that conduct must be charged, if at all, as a violation of Article 92. In the instant case, PFC Manning's alleged conduct is claimed to be in violation of a lawful general order or regulation concerning the unauthorized possession and dissemination of classified information. Therefore, the Government cannot charge PFC Manning with an Article 134 violation and Specification 1 of Charge II must accordingly be dismissed.

18. Article 134 provides in full as follows:

> *Though not specifically mentioned in this chapter*, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (emphasis supplied). Article 92 provides for punishment of any person subject to the UCMJ who "(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties[.]" *Id.* § 892.

19. The Air Force Court of Criminal Appeals in *United States v. Borunda* recently clarified the interplay between Articles 92 and 134 where the invocation of Article 134 is premised on the same conduct that would support an Article 92 charge. *See* 67 M.J. 607 (2009). Citing *United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975), the *Borunda* court held that "when a lawful general order or regulation proscribing [certain conduct] exists, an order or regulation which by definition is punitive, the [proscribed conduct], if charged, will *only* survive legal scrutiny as a violation of Article 92(1), UCMJ, *and not as*

a violation of Article 134, UCMJ." *Borunda*, 67 M.J. at 609 (footnote omitted) (emphasis supplied). The court upheld the use of Article 134 to prosecute an accused for possession of drug paraphernalia where no lawful general order or regulation proscribed such possession, concluding that "in the absence of a lawful general order or regulation, charging officials are at liberty to charge the possession of drug paraphernalia as a violation of Article 92(3), UCMJ, or Article 134, UCMJ." *Id.* (footnotes omitted).

20. The *Borunda* court's holding is supported by both case law and commentary. In *Caballero*, for instance, the Court of Military Appeals addressed the issue of "whether the wrongful and unlawful possession of narcotic paraphernalia on-post, absent any regulation or general order prohibiting that conduct *so as to render any violation thereof an offense under Article 92, UCMJ,* can be properly charged or alleged as an offense under clause 1 of Article 134." 49 C.M.R. at 595 (emphasis supplied). The Court in *Caballero* reversed the accused's conviction under Article 134 for wrongful possession of narcotic paraphernalia, finding that the specification failed to allege an offense. *Id.* at 597. Specifically, the Court declined the Government's request to construe Article 134 broadly enough to cover the charged conduct:

> Since this Court has long recognized and held that the possession of narcotic paraphernalia might otherwise be properly prosecuted as an Article 92 violation, where such an order or regulation exists, we find no demonstrated need to expand the reach of Article 134, beyond that which already exists, to cover an offense such as this.

Id. Thus, *Caballero* supports *Borunda*'s holding that a court must not sustain an Article 134 prosecution under the first or second clause where the conduct underlying that prosecution also violates a lawful general order or regulation.

21. Additionally, the MCM provides that "[i]f any conduct [falling within Article 134's reach] is specifically made punishable by another article of the code, it must be charged as a violation of that article." MCM, para. 60(c)(1). More to the point, the MCM further explains that "[m]any customs of the service are now set forth in regulations of the various armed forces. Violations of these customs *should be charged under Article 92* as violations of the regulations in which they appear if the regulation is punitive." *Id.* para. 60(c)(2)(b) (emphasis supplied); *see also United States v. Henderson*, 32 M.J. 941, 948 (N-M.C.M.R. 1991) (Lawrence, J., concurring) ("[T]he existence of an established custom of the military service may satisfy the notice requirement. The existence of the custom must be proved. If the custom is set forth in a punitive regulation or order, violation of it should be charged under Article 92.").

22. Relying on an earlier version of the MCM containing similar language, Judge Ferguson of the Court of Military Appeals observed that:

> "When an offense is specifically defined in a particular punitive article, it ordinarily should be charged under that article rather than under Article 134, the general article."
>
> Article 92 is one of the punitive articles of the Code . . . and regulations promulgated thereunder must be considered, when charging a violation of the Code, before recourse may be had to the use of Article 134.

United States v. Walter, 43 C.M.R. 207, 212 (C.M.A. 1971) (Ferguson, J., dissenting) (quoting MCM, para. 27 (1969 ed.)). Judge Ferguson cautioned that "Article 134 was not intended by Congress to apply in areas otherwise the subject of specific attention in Articles of the Uniform Code." *Id.* (quoting *United States v. Hallett*, 15 C.M.R. 378, 382 (C.M.A. 1954)).

23. Along similar lines, one commentator has remarked that "Article 92 makes the General Articles [*i.e.* Articles 133 and 134] unnecessary[.]" Note, *Taps for the Real Catch-22*, 81 Yale L. J. 1518, 1541 (1972); *see also Parker v. Levy*, 417 U.S. 733, 788 n.2 (1974) (Stewart, J., dissenting) (citing 81 Yale L. J. 1518 in support of the proposition that Article 92, and not Article 134, should be utilized for failure to obey lawful orders); *cf. United States v. Harwood*, 46 M.J. 26, 29 (C.M.A. 1997) (Cox, C.J., concurring) ("Article 134 has always been understood as a residual provision rather than a redundant one.").[1]

24. Here, the facts alleged by the Government bring this case squarely within the rule announced in *Borunda*. PFC Manning is alleged to have wrongfully and wantonly caused to be published on the internet United States intelligence information with the knowledge that such information is accessible to the enemy. At the time of PFC Manning's alleged unlawful actions, the United States Army had a punitive lawful general order or regulation proscribing the unauthorized possession and distribution of classified information. *See* Army Regulation 380-5, Paragraph 1-21a (stating that Department of Army personnel will be subject to sanctions if they knowingly, willfully, or negligently disclose classified or sensitive information to unauthorized persons). If the Government's evidence is to be believed, PFC Manning's actions constitute a violation of that lawful general order or regulation. *See* MCM, para. 16(b)(1) (stating the elements of a successful Article 92(1) prosecution: "(a) That there was in effect a certain lawful

[1] The resolution of this issue is not controlled by *United States v. McGuinness*, wherein the Court of Military Appeals determined that "prosecution of violations of 18 U.S.C. § 793(e) under Clause 3 of Article 134 is not preempted by Article 92." 35 M.J. 149, 152 (C.M.A. 1992). The rule announced in *Borunda* in no way relies on the preemption doctrine. *See Borunda*, 67 M.J. at 609. Additionally, while the conduct supporting the Article 134 charge (brought under clause 3) in *McGuinness* was the violation of a federal statute, *see* 35 M.J. at 152, the alleged conduct supporting the Article 134 specification and charge (brought under clause 1 or 2) in the instant case is PFC Manning's alleged wrongful and wanton publication on the internet of United States intelligence information, with the knowledge that information placed on the internet is accessible to the enemy. Thus, *McGuinness* is inapposite to the question of the propriety of the Government's Article 134 specification and charge in this case.

general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation."). Therefore, under the rule outlined in *Borunda*, the Government must charge this conduct, if at all, as a violation of Article 92; it cannot charge the conduct as a violation of Article 134. *See* 67 M.J. at 609.

25. Thus, because the Government cannot lawfully charge PFC Manning with a violation of Article 134 for conduct that is chargeable only under Article 92, the Government does not state a cognizable Article 134 offense against PFC Manning. Accordingly, Specification 1 of Charge II should be dismissed.

CONCLUSION

26. Wherefore, in light of the foregoing, the Defense requests this Court dismiss Specification 1 of Charge II for failure to state an offense because Specification 1 of Charge II, as currently drafted, is preempted by Article 104 or, in the alternative, because Specification 1 of Charge II must be charged as a violation of Article 92 since there is a lawful order or regulation prohibiting the unauthorized possession and dissemination of classified information.

Respectfully submitted,

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